

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DEMETRI ALEXANDER,

Plaintiff,

v.

GARY DUTTON,

Defendant.

Case No. 3:15-cv-00074-MMD-WGC

ORDER

The court screened Plaintiff's original complaint and dismissed it with leave to amend on May 27, 2015. (Electronic Case Filing (ECF) Nos. 7, 8.) Plaintiff filed his amended complaint on June 1, 2015. (ECF No. 9.) Plaintiff filed a notice of change of address noting his move from Northern Nevada Correctional Center (NNCC) to High Desert State Prison (HDSP) on September 14, 2015. (ECF No. 12.) On December 10, 2015, the court issued a screening order that allowed Plaintiff to proceed with a single claim against Gary Dutton under the Fourteenth Amendment's Due Process Clause related to the alleged authorized, intentional deprivation of his blue jeans. (ECF No. 14.)

On February 2, 2016, the court issued an order scheduling an inmate early mediation conference. (ECF No. 16.) The conference was held on March 1, 2016, and Plaintiff appeared, pro se. (*See Minutes* at ECF No. 17.) A settlement was not reached.

Defendant filed his motion for summary judgment on March 10, 2016. (ECF No. 19.) It was served on Plaintiff at HDSP, in accordance with his last change of address. (ECF No. 19 at 9.)

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1 On March 11, 2016, the court issued a *Klinge*¹ order advising Plaintiff his response was
2 due within twenty-one days. (ECF No. 20.) Plaintiff's in forma pauperis application was granted
3 on March 14, 2016. (ECF No. 21.) As with Defendant's Motion for Summary Judgment, the
4 court's *Klinge* order was mailed to Plaintiff at HDSP. (ECF No. 20.)

5 Plaintiff filed another notice of change of address on March 23, 2016, indicating a move
6 from HDSP to Southern Desert Correctional Center (SDCC). (ECF No. 22.) Plaintiff's notice
7 was dated "3-18-16" but was not filed until March 23, 2016. (*Id.*) The docket reflects that the
8 *Klinge* order was re-mailed to Plaintiff, but was not received by Plaintiff until August 25,
9 2016, at SDCC in light of the change of address. (*See* ECF No. 20.) On August 31, 2016, the
10 undersigned issued a report and recommendation that Defendant's motion for summary
11 judgment be granted on the basis that Plaintiff failed to exhaust his administrative remedies with
12 respect to his claim. (ECF No. 23.)

13 Plaintiff filed his objection to the report and recommendation on September 9, 2016.
14 (ECF No. 25.) Plaintiff states that he did not receive the minute order dated March 11, 2016 (the
15 *Klinge* order) and order dated March 14, 2016 (the order granting his in forma pauperis
16 application) until August 30, 2016, advising him that he had twenty-one days to file a response
17 to the motion for summary judgment. (ECF No. 25 at 2.) Before he could respond to the Motion
18 for Summary Judgment, on September 2, 2016, he received the undersigned's report and
19 recommendation that summary judgment be granted. (*Id.*) As a result, he asks that the motion for
20 summary judgment be denied, and that his claim be allowed to proceed.

21 Defendant filed a response to the objection. (ECF No. 26.) Defendant asserts; (1) Plaintiff
22 does not support his request that the motion for summary judgment be denied because he did not
23 timely receive the referenced orders; (2) he does not argue that he was not served with the
24 motion for summary judgment; (3) he does not address whether he filed a proper grievance so as
25 to exhaust his administrative remedies; and (4) he provides no substantive reasoning for the
26 court to deny the report and recommendation.

¹ *Klinge v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988).

1 It is not clear when or even whether Plaintiff received Defendant's motion for summary
2 judgment. Plaintiff does not specifically state that he was not served with the motion, but the
3 court acknowledges that it was served at HDSP around the time when he moved from HDSP to
4 SDCC. If he did not receive the *Klinge* order which went out one day after the motion for
5 summary judgment was filed, there is a chance he did not receive the motion for summary
6 judgment either.

7 Under *Klinge*, a pro se litigant must be provided with fair notice of the requirements of
8 the summary judgment rule. If Plaintiff did not receive this notice until shortly before the court
9 issued its report and recommendation, that notice was insufficient.

10 Therefore, the court hereby **WITHDRAWS** its report and recommendation
11 (ECF No. 23). Plaintiff acknowledges he is now in possession of the *Klinge* order; therefore,
12 Plaintiff has **TWENTY-ONE** days from the date of this Order to file and serve his response to
13 Defendant's motion for summary judgment. The Clerk shall **SEND** Plaintiff a copy of
14 Defendant's motion for summary judgment and accompanying exhibits along with a copy of this
15 order. Defendant's shall file their reply brief in accordance with the Local Rules. Once the
16 matter is fully briefed, the court will issue its report and recommendation.

17 **IT IS SO ORDERED.**

18 DATED: November 22, 2016.

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21 WILLIAM G. COBB
22 UNITED STATES MAGISTRATE JUDGE
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